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Remarks on the Arab Spring Symposium, Fall 2012 - Prof. Chiara Giorgetti

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Professor Chiara Giorgetti teaches and writes in the areas of international law, international arbitration, international dispute resolution, and state failure and fragility. She has authored over a dozen publications on these topics, and her JSD doctoral dissertation resulted in the publication of her book, *A Principled Approach to State Failure, International Community Actions in Emergency Situations*, in 2010. Prior to joining the Richmond Law faculty in 2012, Professor Giorgetti practiced international arbitration in Washington D.C. and Geneva, Switzerland. Professor Giorgetti also worked extensively with the United Nations in New York and Somalia, where she oversaw the implementation of United Nations Development Programme governance programs. She has served as a consultant for various international organizations and non-governmental organizations and taught advanced international courses at Georgetown Law Center. Professor Giorgetti clerked at the International Court of Justice in The Hague. She is an active member of the American Society of International Law (ASIL) and co-chaired its 2011 annual meeting. She also founded and co-chairs ASIL's Interest Group on International Courts and Tribunals.

REMARKS:

I would like to thank the organizers of this event for inviting me to talk today about a topic which is both timely and important: The Arab Spring and Syria. I was asked to be brief and provocative, and I hope that I can do both in my presentation. I would like to make three points. First, I would like to briefly discuss the doctrine of *Responsibility*

to Protect, and its legal and political implications. Then, I will examine how the *Responsibility to Protect* doctrine has been recently applied in Libya. Finally, building on these two elements, I will assess the applicability of the *Responsibility to Protect* principle in the context of the crisis in Syria.

To start, the *Responsibility to Protect* is a doctrine that, among other things, and at its maximum, allows members of the international community or a state to intervene to address mass atrocities and human rights abuses in another State, which causes these mass atrocities.¹ This doctrine, also known as *R2P*, has been a much-discussed topic since 2000 in international law, international politics, and international relations. *R2P* has been both a promising and, at the same time, a disappointing concept.

Conventional wisdom says that *R2P* was developed as a reaction to the United Nations (U.N.) and the Security Council's lack of action in Rwanda and Yugoslavia (both in Bosnia and Kosovo). It was meant as a way to overcome the deadlock created by the veto-based voting system of the Security Council and to ensure that the international community would address gross violations of human rights effectively.

In my view, it is more correct to see the development of the *R2P* as a policy reinterpretation of the U.N.'s role, in general, in intervention to maintain

¹ See *infra*, Rep. of the Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility To Protect*, 6 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; See also generally, Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 Stan. J. Int'l L, 319 (2012).

international peace and security.² As such, it comes in the aftermath, not only of inaction in Rwanda and Yugoslavia, but also of the attempted first interventions in Somalia, East Timor, Iraq, and Haiti. This means that *R2P* comes at a time when the U.N. is trying to redefine a role for itself in international crises and on matters that were newly considered to be a “threat to international peace and security.” Therefore, it is a continuation of the rebalancing of the sovereignty and intervention dichotomy, and it addresses the question of to whom sovereignty belongs. The *R2P* debate continues the discussion on sovereignty that belongs to the people and not to the State, and intervention as protection of that sovereignty.³

R2P provides a framework for action so that the international community and other States have a right of intervention in cases of mass human rights violations. This right is rephrased as a duty and as an obligation that States have to intervene in case of egregious mass violations of human rights. It is structured as an intervention to overcome the veto-holding powers in the Security Council so that States have to act and have a justification or reason to act.

² See U.N. Charter art. 1 (stating that the first purpose of the United Nations is “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”); See also U.N. Charter art 41 (“the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...], to maintain or restore international peace and security.”).

³ W Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J Int’l L 866, 872 (1990).

R2P was first discussed in a 2001 Canadian report commissioned and published by the International Commission on Intervention and State Sovereignty (ICISS).⁴ The Report, called *The Responsibility to Protect*, provides for an escalating three-prong process: First, the state itself has a primary duty to prevent mass human rights violation. Second, it is the duty of the state itself to protect civilians. Third, and only if the first two procedures fail, there is a duty to intervene by outside States.⁵ Throughout this process, the role of the Security Council in securing peace remains.

In 2005, the U.N. World Summit endorsed the *Responsibility to Protect* doctrine in its Outcome Document, which was also formally adopted by the U.N. General Assembly. As adopted, the *RP2* was much scaled down and diluted. The Outcome Document provides that:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

⁴ Rep. of the Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility To Protect*, 6 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

⁵ *Id.*

139. ...We [States] are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis, in cooperation with relevant regional organizations, as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁶

And so this is my first provocative point: *R2P* was very important politically in trying to reframe the issue of intervention differently, but legally it didn't really change anything. The role of the Security Council is maintained and the initial responsibility to protect remains on the State. In the Outcome Document, as paragraph 139 demonstrates, states essentially agree to act in accordance to the UN Charter. In 2005, States further diluted *R2P* by restricting and defining the mass violations that would entail the intervention and responsibility to protect.

The second provocative point relates to the intervention in Libya in 2011, often considered and

⁶ 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>.

presented as a triumph of *R2P*. The Economist said that it was finally *R2P* in action.⁷ But if one looks at the language of the U.N. Security Council resolution 1973/2011, it only states that the responsibility to protect its people rests with the Libyan government.⁸ There is no mention of the responsibility to protect in reference to the international community. The mandate that gave power to NATO and other States, and created sanctions, was based on a different principle, not *R2P*. The resolution provides

The Security Council acting under Chapter VII of the Charter of the United Nations, authorized members states that have notified the Secretary General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary General “to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack” in Libya.⁹

The third provocative point is about Syria. Is the *Responsibility to Protect* going to be something that can help resolve the Syrian crisis? I think that it is very unlikely that this will happen. Not only as an *R2P*, but also

⁷ *The Lessons of Libya*, *Economist*, May 21, 2011, available at <http://www.economist.com/node/18709571>.

⁸ S.C. Res. 1973 ¶¶ 3-4, U.N. Doc. S/RES/1973 (Mar. 17, 2011) available at

[http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973(2011))

⁹ S.C. Res. 1973, U.N. Doc. S/RES/1973 (March 17, 2011).

generally as an act of intervention, the Syrian crisis is much more complicated than the crisis in Libya. Political and economic issues are very different from those that were present in Libya, and are much more complex. But furthermore, because of what happened in Libya and how the *R2P* principle is seen as having been applied in Libya, I think it is even less likely that the principle would be applied in Syria.¹⁰ Unless major changes occur, I doubt we will see any *R2P* intervention and use of military force sanctioned by the U.N. to protect the people of Syria.

Thank you, and I look forward to your comments and questions.

Post-Script: Few months after delivering these remarks, the situation in Syria has not changed. The civil war continues and the international community has been unable to agree to intervene to protect civilians. At the end of April 2013, however, President Obama declared that the use of chemical weapons against civilians would be a “game changer.”

¹⁰ See Charles Homans, *Responsibility to Protect: A Short History*, FOREIGN POL’Y, Nov. 2011, at 34-35, available at http://www.foreignpolicy.com/articles/2011/10/11/responsibility_to_protect_a_short_history.

donor nations. So, in the meetings in Jordan, the president of the Polish legal clinic association was there to talk about their recent experience, and we had South African, Spanish, French and Indian law professors there who were talking about their experience with clinical legal education. I do not think this is something that you could sell as “made in America,” even though we have a rich and long tradition of legal clinical education. It will not work if it is not wanted locally, and it feels to me as though there is a reason why this movement has flourished and grown so exponentially. That is also why there is such promise for clinical legal education in the Middle East.

My sense is that this kind of experiential learning is universal and that what we know about adult learning and cognition tells us that people love to learn experientially, and do so quite effectively. Students increasingly demand it, and I hope you do here.